

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000548-001 DT

04/05/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

KENNETH M FLINT

v.

JENNIFER LYNN GIBSON (001)

PAUL M RYBARSYK

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number M-751-CR-2011-026904.

Defendant-Appellant Jennifer Lynn Gibson (Defendant) was convicted in Scottsdale Municipal Court of possession of drug paraphernalia. Defendant contends (1) the trial court did not have jurisdiction for this offense, (2) the trial court erred in denying her Motion To Suppress, which alleged the officer did not have the legal right to search her vehicle, and (3) the State did not present sufficient evidence to support her conviction. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On October 8, 2011, Defendant was cited for possession of drug paraphernalia, A.R.S. § 13-3415(A). Prior to trial, Defendant filed a Motion To Suppress alleging the officer did not have the legal right to stop her vehicle and did not have the legal right to search her vehicle, and further alleging her statements were not voluntary.

At the hearing on Defendant's motion, Officer Danny Garcia testified he was on duty on October 8, 2011, when he stopped a vehicle driven by Levi Marin and arrested him for DUI. (R.T. of Jun. 12, 2012, at 5-6, 9, 11.) Marin told Officer Garcia the vehicle was not his. (*Id.* at 7.) While Officer Garcia was in the process of arresting Marin, he noticed the odor of marijuana coming from the vehicle. (*Id.* at 7, 9, 12-13.) Based on this smell of marijuana and the requirement that he conduct an inventory search, Officer Garcia searched the vehicle and found a small amount of marijuana and a multi-colored glass pipe in the center armrest. (*Id.* at 8, 9-12, 15-16.)

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At some point, Defendant came out of a restaurant and approached Officer Garcia, who told her he was in the middle of a traffic stop and she would have to leave. (R.T. of Jun. 12, 2012, at 7, 17.) Defendant later returned, and Officer Garcia discussed with her the items he had found in the vehicle. (*Id.* at 17–18.)

The attorneys then made their arguments to the trial court. (R.T. of Jun. 12, 2012, at 20, 21.) The trial court ruled the search was valid under two of the exceptions to the warrant requirement and denied Defendant's Motion To Suppress. (*Id.* at 23.)

The matter then proceeded to trial. (R.T. of Jul. 13, 2012, at 24.) Officer Garcia testified he was on duty on October 8, 2011, when he stopped a vehicle owned by Defendant, but was driven by her boyfriend. (*Id.* at 26.) During the traffic stop, Officer Garcia smelled marijuana coming from the vehicle, so he searched the vehicle and found a small amount of marijuana and a multi-colored glass pipe in the center armrest. (*Id.* at 27–29.) At two times during his processing of the driver, Defendant came out of a nearby restaurant and spoke to Officer Garcia, who told her about finding the marijuana and pipe in the vehicle. (*Id.* at 26–27.) Defendant told Officer Garcia there was marijuana and a pipe in the vehicle and that the pipe belonged to her. (*Id.* at 30–31, 34–38.) Officer Garcia then cited Defendant for possession of drug paraphernalia. (*Id.* at 31.)

Patrick Kosecki testified he was employed as a criminalist for the City of Scottsdale. (R.T. of Jul. 13, 2012, at 38–39.) He tested the glass pipe in this case and discovered marijuana residue on it. (*Id.* at 39–42, 44.)

The attorneys then made their final arguments to the trial court. (R.T. of Jul. 13, 2012, at 45, 46, 47.) The trial court found Defendant guilty of possession of drug paraphernalia and imposed sentence. (*Id.* at 48–49.) On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES:

A. *Did the trial court have jurisdiction in this matter.*

Defendant contends the trial court did not have jurisdiction in this matter because it was a class 6 felony. A class 6 felony shall be designated a misdemeanor if a complaint is filed in justice court or municipal court charging the offense as a misdemeanor. A.R.S. § 13–604(B)(2). In the present case, a complaint was filed with the municipal court charging the offense as a misdemeanor, thus the trial court had jurisdiction to try this case.

To the extent Defendant may be contending A.R.S. § 13–604(B) requires the prosecutor to be the one to file the complaint and thus the process here was defective because the police officer filed the complaint, this Court concludes Defendant has waived that issue. In *State v. Maldonado*, 223 Ariz. 309, 223 P.3d 653 (2010), the court held the failure to file a charging document altogether did not deprive the court of jurisdiction, and the defendant waived any issue about the failure to file the charging document by not objecting prior to trial. *Maldonado* at ¶¶ 7–26. In the present matter, Defendant never objected prior to trial that it was the police officer and not the prosecutor who filed the complaint. If Defendant had objected, the prosecutor either could have

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filed a new complaint, or stated to the trial court that the officer had permission to act as the prosecutor's agent in filing the complaint. Because Defendant did not object prior to trial, this Court concludes Defendant has waived this issue. To the extent Defendant contends this is a matter of subject matter jurisdiction, which she may raise at any time, this Court concludes, based on the reasoning in *Maldonado*, any defect would be a matter of personal jurisdiction that a defendant will waive if not raised prior to trial, and not a matter of subject matter jurisdiction.

B. *Did the trial court abuse its discretion in determining the officer did not need a warrant to search Defendant's vehicle.*

Defendant contends the trial court abused its discretion in determining the officer did not need a warrant to search her vehicle. Police may search an automobile without a warrant if they have probable cause to believe the contents of the automobile offend against the law, and they do not need exigent circumstances for the search. *State v. Prasertphong*, 206 Ariz. 70, 75 P.3d 675, ¶¶ 25–27 (2003). The odor of marijuana emanating from a vehicle is sufficient to give probable cause to believe the vehicle contains contraband. *State v. Harrison*, 111 Ariz. 508, 509, 533 P.2d 1143, 1144 (1975) (officer stopped vehicle because rear tire was “bouncing,” and while examining tire, smelled odor of marijuana coming from vehicle; officer opened trunk and found over 200 kilograms of marijuana; court held officer was justified in stopping vehicle, and once he smelled odor of marijuana, this provided sufficient probable cause to make further search); *State v. Reuben*, 126 Ariz. 108, 109, 612 P.2d 1071, 1072 (Ct. App. 1980) (officer stopped defendant's vehicle for speeding, and as officer approached driver's side, smelled odor of burned marijuana; court held smell of burned marijuana gave probable cause to search vehicle; court rejected defendant's argument that only odor of burning, rather than burned, marijuana would give probable cause); *State v. Zamora*, 114 Ariz. 75, 77, 559 P.2d 195, 197 (Ct. App. 1976) (officer stopped vehicle for speeding, and detected “very faint” odor of marijuana coming from trunk; court held this gave officer probable cause to search trunk, and held there was no requirement that it be strong odor). Because Officer Garcia smelled the odor of marijuana coming from the vehicle, he had probable cause to search the vehicle, and because the vehicle was an automobile, Officer Garcia did not need a warrant to search it.

Furthermore, an inventory search without a warrant is valid if (1) the law enforcement official has lawful possession or custody of vehicle and (2) the official conducts the inventory search in good faith and not as a subterfuge for a warrantless search. *State v. Organ*, 225 Ariz. 43, 234 P.3d 611, ¶ 21 (Ct. App. 2010). An inventory search conducted pursuant to standard procedures is presumptively considered to have been conducted in good faith and therefore reasonable. *Id.* In the present case, Officer Garcia made a valid traffic stop of the vehicle. Once he discovered the driver was driving under the influence, he arrested the driver and then had to impound the vehicle. Officer Garcia testified the departmental regulations required him to conduct an inventory search of the vehicle, and during that search he found the marijuana and the pipe. The inventory search without a warrant was therefore valid. The trial court thus properly denied Defendant's Motion To Suppress.

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For authority, Defendant cites *Arizona v. Gant*, 556 U.S. 332 (2009), which held as follows:

Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. Consistent with the holding in *Thornton v. United States*, and following the suggestion in Justice Scalia's opinion concurring in the judgment in that case, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.

556 U.S. at 332 (citations omitted). In that opinion, the Court also stated:

If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross* authorizes a search of any area of the vehicle in which the evidence might be found.

556 U.S. at 337 (citations omitted). In the present case, Officer Garcia searched the vehicle because he had "probable cause to believe [the] vehicle contain[ed] evidence of criminal activity" (marijuana), and not because it was "incident to a recent occupant's arrest after the arrestee ha[d] been secured and [could not] access the interior of the vehicle." Thus, *Gant* does not preclude the warrantless search of the vehicle.

C. Did the State present sufficient evidence to support the guilty verdict.

Defendant contends the State did not present sufficient evidence to support the guilty verdict. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining "whether substantial evidence supports the jury's finding, viewing the facts in the light most favorable to sustaining the jury verdict." Substantial evidence is proof that "reasonable persons could accept as adequate . . . to support a conclusion of defendant's guilt beyond a reasonable doubt." We resolve any conflicting evidence "in favor of sustaining the verdict."

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the trier-of-fact, but whether there is a complete absence of probative facts to support its conclusion. *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). In the present case, Officer Garcia found a pipe inside the vehicle, Defendant told him the pipe belonged to her, and the criminalist testified there was marijuana residue on the inside of the pipe. This Court concludes those probative facts were sufficient to support the trial guilty verdict.

Defendant also notes the State never introduced the marijuana pipe in evidence. The mere fact the State did not introduce that item in evidence does not mean it did not exist. A similar situation occurred in *State v. Geotis*, 187 Ariz. 521, 930 P.2d 1324 (Ct. App. 1996), where the de-

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endant was convicted of possession of marijuana for sale. During the trial, the officer testified he found cash, a club, a water pistol, and a pager inside defendant's car. The defendant claimed, because state did not offer those items in evidence, the officer's testimony was hearsay. The court disagreed and found defendant's argument "frivolous." 187 Ariz. at 524, 930 P.2d at 1327.

III. CONCLUSION.

Based on the foregoing, this Court concludes (1) Defendant has waived any claim that the trial court did not have jurisdiction for this offense, (2) the trial court did not abuse its discretion in denying Defendant's Motion To Suppress, and (3) the State presented sufficient evidence to support her conviction.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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